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In the Supreme Court
OF THE
United States

October Term, 1973

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No.

FORD WHOLESALE COMPANY, INC., *Petitioner,*

vs.

FIBREBOARD PAPER PRODUCTS CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner, Ford Wholesale Company, Inc. (hereinafter "Ford") prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (Court of Appeals No. 72-2570) entered in the above-entitled case on February 20, 1974. A petition for rehearing and suggestion for rehearing in banc was denied by the Court of Appeals on April 5, 1974.

OPINIONS OF THE COURTS BELOW

The judgment and opinion of the United States District Court for the Northern District of California, setting

aside a jury verdict of $100,000 in favor of plaintiff Ford and entering judgment notwithstanding the verdict in favor of defendant Fibreboard Paper Products Corporation ("Fibreboard") is reported as follows: *Ford Wholesale Company, Inc. v. Fibreboard Paper Products Corporation*, 344 F.Supp. 1323 (N.D.Cal., 1972) and a copy of that opinion is attached as Appendix A to this Petition.

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit affirming the entry of judgment notwithstanding the verdict in the above entitled case is reported at ..... F.2d ....., 1974 CCH Trade Cases ¶ 74,940 (9th Cir. 1974). A copy of that opinion is attached as Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on February 20, 1974. Petitioner Ford timely filed a petition for rehearing and suggestion for rehearing in banc which was denied by the Court of Appeals on April 5, 1974. (A copy of the order of the Court of Appeals is attached as Appendix C to this Petition.) The judgment and opinion of the Court of Appeals presents a significant issue as to the coverage of the federal antitrust laws and also creates a conflict among the Circuits with respect to the issue of an antitrust violation's affect on interstate commerce.

The jurisdiction of this Court is, therefore, invoked pursuant to 28 U.S.C. §1254.

QUESTION PRESENTED

The sole question is whether the courts below erred in ruling that interstate commerce was not involved in the defendant-respondent's anticompetitive conduct which otherwise constituted a violation of Section 1 of the Sherman Act?

STATUTES INVOLVED

(1) Section 1 of the Sherman Act (15 U.S.C. §1) provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

(2) Section 2 of the Sherman Act (15 U.S.C. §2) provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

STATEMENT OF THE CASE

(A) NATURE OF THE CASE

This is a private antitrust action for damages under Section 4 of the Clayton Act (15 U.S.C. §15). Plaintiff-petitioner Ford alleges that defendant-respondent Fibre-

board combined and conspired with various competitors of Ford to monopolize, attempted to monopolize and did monopolize trade and commerce in the relevant market in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2). (R. 4.)[1]

Ford is engaged in the business of marketing, selling and distributing roofing products throughout the San Francisco, California, Bay Area including the counties of Alameda, Contra Costa, San Mateo, Santa Clara, Monterey and San Francisco. (R. 433.) Fibreboard was, during the relevant period, in the business of manufacturing and selling PABCO roofing products to distributors such as Ford and the co-conspirators herein who are Ford's competitors.

The principal allegation in this case is that Ford's competitors induced and persuaded Fibreboard to refuse to sell or deliver roofing materials to Ford, a vigorous price-cutting competitor. (R. 436.) As a result of this alleged combination in restraint of trade, Ford suffered substantial financial losses. (R. 443-444.)

(B) THE COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

The complaint in this case was filed by Ford on November 10, 1966. (R. 1.) On or about July 28, 1970, defendant filed a motion for summary judgment. (R. 304, 307.) On October 20, 1970, after briefs were submitted and a hearing was held, the District Court denied the motion for summary judgment. (R. 422.)

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[1] "R." as used throughout this brief refers to the record on appeal. The number which follows refers to the page number in the record.

Trial commenced on October 26, 1971. (R. 1068.) At the conclusion of plaintiff's case, defendant moved for a directed verdict, *inter alia*, on the ground that plaintiff had failed to prove the requisite involvement with interstate commerce. (T. 803-820.) The District Court denied this motion. Thereafter defendant offered no evidence whatever to negate the interstate commerce evidence which plaintiff introduced. At the close of the trial, the jury returned a verdict in favor of plaintiff Ford in the amount of $100,000. (R. 645.) Defendant Fibreboard then filed its motion for judgment notwithstanding the verdict or, alternatively, for new trial. (R. 768.)

This motion was based on various grounds common to such motions. For example, defendant argued that the evidence was insufficient to support the finding of conspiracy and the determination of damages, that instructions were erroneous, etc. In its motion defendant also claimed that plaintiff had failed to establish the requisite involvement of interstate commerce. (R. 758-766.)

On May 30, 1972, the District Court entered judgment notwithstanding the verdict in favor of the defendant. (R. 1048.) The Court granted defendant's motion only on the interstate commerce ground. In all other respects, the defendant's motion was denied. (R. 1027.)

The unusual context in which the court decided the "interstate commerce" issue should also be noted. As the District Court recognized in its opinion (R. 1017-1018), the defendant contended that there was insufficient evidence for submission of the commerce issue to the jury; accordingly, defendant offered no jury instructions on

that issue. Thus, the question for the court was, merely, whether plaintiff had submitted sufficient evidence to satisfy the interstate commerce element. If, on a reading of the record, the evidence is sufficient for submission to the jury, then—in this case—plaintiff has satisfactorily established a restraint on interstate commerce.

Thus, the sole question presented by this petition is whether there was evidence from which the jury could have found that interstate commerce was involved in the defendant's anticompetitive conduct which otherwise constituted a violation of Section 1 of the Sherman Act (15 U.S.C. §1).

(C) STATEMENT OF FACTS

(1) The Background of the Case.

Ford, for several years prior to the damage period covered in the complaint, had been engaged in business as a distributor of roofing products in various counties in the San Francisco Bay Area. (R. 433.) Its principal place of business was in San Jose, California. Wholesale Building Supply, Inc. ("WBSI") and State Shingle Co. ("State") were competing distributors of roofing products serving much of the same market area both having their respective principal places of business in Oakland, California. (R. 434.) Defendant Fibreboard was, during the relevant time period, the manufacturer of "PABCO" brand roofing products which it sold to distributors such as Ford, WBSI and State.

The evidence at trial below demonstrated that Ford, which had warehouses in San Jose and San Francisco,

planned to open an additional warehouse and sales operation in Oakland in the latter part of 1963. The news of the new Ford warehouse was most distressing to two of Ford's competitors in the Oakland area—WBSI and State. Mr. Lewis (State) and Mr. Volker (WBSI) each complained directly to at least two Fibreboard representatives (Mr. Leo LaPlant and his superior, Mr. John Hoover). T. 83-98; 141-142.)[2] The Fibreboard people were advised that this new competition would not be welcomed (T. 141-142) and that State for one might take on other roofing lines if Fibreboard supplied Ford's Oakland operation with PABCO materials. (T. 98.)

Lewis also confirmed that Ford was a lower priced competitor (a "price-cutter") and identified a letter sent by State to its customers announcing lower prices in response to price competition in the Oakland area which was stimulated principally by Ford's lower prices. (Pl. Ex. 18; T. 207-210.)

It was undisputed that during the years 1961, 1962 and 1963, Fibreboard made annual sales of PABCO products to plaintiff Ford in the amounts of $90,500; $509,600; and $563,600 respectively. (R. 435.) However, in late 1963, after receiving complaints about Ford's price cutting and its new Oakland warehouse (see plaintiff's summarization of testimony at R. 854-861 and R. 871) defendant Fibreboard initially refused to make deliveries of roofing material to Ford's Oakland warehouse and eventually terminated all business dealings with Ford. (R. 436.)

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[2]"T." refers to the Reporter's Transcript of the trial and proceedings below. The numbers following "T." refer to the relevant pages of the transcript.

From the beginning of the trial through the final arguments, the singular and overriding issue for the jury was whether defendant Fibreboard's refusal to deliver and eventual termination of business with plaintiff Ford was in response to urging by, and thus pursuant to agreement with plaintiff's competitors, or whether Fibreboard unilaterally terminated its business dealings with Ford on the basis of independent business judgment. The jury's verdict in favor of plaintiff necessarily reflects a finding of concerted action between Fibreboard, WBSI and State whereby plaintiff Ford was cut-off from its source of supply because of complaints from its competitors who were unable or unwilling to meet Ford's vigorous competition including its lower prices. (See the District Court's Instructions to the jury, T. 928-947; see also, *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Radiant Burners, Inc. v. People's Gas Light and Coke Co.*, 364 U.S. 656 (1961); *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Girardi v. Gates Rubber Co.*, 325 F.2d 196 (9th Cir. 1963).

The District Court refused to grant defendant's motion for judgment notwithstanding the verdict or, alternatively, new trial on grounds relating to the weight of the evidence, the proof of damages, the propriety of the instructions or the admissibility of evidence. Indeed, as to those grounds the Court specifically and expressly denied defendant's motion. The Court below did, however, grant the motion for judgment notwithstanding the verdict on the ground that defendant's concerted and anticompetitive conduct, although otherwise violative of Section 1 of the Sherman Act, was not in restraint of interstate commerce within the meaning of that statute. (R. 1016-1027.) The Court of

Appeals for the Ninth Circuit affirmed ". . . for the same reasons and upon the same legal grounds set forth (by) the District Court".

(2) The Evidence Concerning Interstate Commerce.

At the trial the defendant took the position that the evidence concerning interstate commerce was insufficient to go to the jury. (R. 1017-1018). Defendant refused to submit proposed instructions on that issue. (R. 1124-25). The immediate question for the District Court, then, was whether plaintiff's evidence on interstate commerce was legally sufficient to present to the jury. The case (absent the interstate commerce issue) was submitted to the jury and a verdict in plaintiff's favor was returned. The subsequent grant of judgment notwithstanding the verdict on the commerce issue as affirmed by the Court of Appeals must, then, be taken as a ruling that plaintiff's evidence was insufficient to even raise a jury question as to the restraint on interstate commerce. The facts summarized immediately below indicate that the lower courts' rulings were erroneous.

It is undisputed that defendant Fibreboard manufactured PABCO roofing products at its roofing plant at 6350 Northwest Front Avenue in Portland, Oregon, as well as at several locations within California. (R. 434-435). Inasmuch as it was clear (from the undisputed facts in the joint pretrial statement) prior to trial, that some of these Oregon produced roofing materials were shipped across state lines from Oregon to the relevant market in California, plaintiff had properly assumed that no issue of interstate commerce would be raised in the case. (R. 901). This assumption was reasonable in light

of the defendant's pre-trial posture in the case. *First,* prior to trial, Fibreboard made a motion for summary judgment; nowhere in that motion for summary judgment did they assert a lack of involvement of interstate commerce. (R. 307, et seq.). *Second,* after the District Court denied that motion for summary judgment, Fibreboard filed, in accordance with Local Rule 105, a Pre-Trial Statement (R. 279, *et seq.*) which did not raise any factual or legal issues concerning interstate commerce; nor did it include the citation of any case dealing with interstate commerce. *Third,* after the respective pre-trial statements were filed a pre-trial order was signed in the case by the trial judge, and that pre-trial order does not list among the issues to be litigated any question concerning interstate commerce. (R. 433-444). *Fourth,* within a few days before the trial was to start, Fibreboard gratuitously (there being no obligation to do so) filed an extensive pretrial brief in which there was no issue framed concerning commerce and no citation of any case dealing with commerce. (R. 593, *et seq.*) Finally, Fibreboard filed a set of jury instructions which contained no instruction whatever on interstate commerce (R. 684, *et seq.*) It was only on the first day of trial that plaintiff's counsel was advised that defendant Fibreboard would, in fact, raise the lack of interstate commerce in defense. (R. 901.)

The District Court rejected plaintiff's contention that defendant had waived objection to the interstate commerce issue and that they should be estopped from now denying the existence of requisite interstate involvement. The Court did admonish defendant's counsel to cooperate with plaintiff in gathering together all relevant data con-

cerning interstate commerce. (R. 902.) Defendant, however, did not cooperate in the gathering of information requested by plaintiff. During trial, defendant failed to produce documents in response to plaintiff counsel's frequent requests for statistical information solicited concerning interstate commerce. (R. 902-905).

Notwithstanding the defendant's surprise and belated injection of the interstate commerce issue into the case and the lack of cooperation in producing the information as requested by plaintiff Ford, the District Court ruled that there was no estoppel or waiver concerning that issue. (R. 1087.) Despite this handicap imposed on plaintiff Ford, substantial evidence of involvement with interstate commerce was nevertheless presented. Moreover, at the close of plaintiff's evidence, defendant's motion for directed verdict on interstate commerce grounds was denied (T. 803-820) and defendant thereafter offered no evidence negating interstate involvement. Plaintiff's evidence concerning interstate commerce was as follows:

Mr. Leo LaPlant, the first witness to testify, was a Fibreboard sales representative in the Oakland area during the relevant period. La Plant confirmed the fact that roofing materials produced at Fibreboard's Portland, Oregon plant were delivered to California for distribution to wholesalers in the San Francisco Bay Area. The relevant portion of Mr. LaPlant's testimony was as follows (T. 80):

> "Q. Incidentally, sir, do you know whether or not any materials produced at the Oakland plant—excuse me, the Portland, Oregon plant were ever delivered down here for distribution to wholesalers?

A. Yes, there was.

Q. And what line of materials were those, sir?

A. The general line of roofing products.

Q. They were shipped from Portland to the Bay Area?

A. Yes.

Q. And they were distributed to wholesalers?

A. Yes."

In fact, Mr. LaPlant had specific recollection of such Oregon produced materials being sold to State Shingle (T. 80), one of Ford's competitors and an alleged co-conspirator in the scheme to deprive plaintiff of its source of supply.

The interstate aspect of this case was also confirmed by LaPlant's superior, Mr. John Hoover. Hoover testified that the greatest bulk of building materials sold to distributors in the San Francisco Bay Area came from the Fibreboard plant in Martinez, California; but that the second largest source of supply for the relevant market was from Fibreboard's plant in Portland, Oregon. (T. 182-183). Mr. Hoover's testimony was as follows:

"The Court: Well, do you know from what plant the building materials—what plant of yours the building materials were shipped into for the East Bay Area?

The Witness: Well, the greatest bulk of them would come out of Martinez.

The Court: All right. And what about the residue after the greatest bulk from Martinez?

The Witness: Well, that is the point. They may have been shipped from Portland. Some may have." (T. 182).

* * * * * * * * *

"Q. Well, Mr. LaPlant told us yesterday that the Portland plant shipped materials down into the Bay area. Would you dispute that?

A. No."

(T. 183).

As the District Court itself recognized, based on the evidence it heard, the supply of roofing materials from Fibreboard's Portland, Oregon, plant was particularly important during periods when there existed shortages of materials. (R. 1022). And it was during such periods of shortage that the competitive situation between Ford and its competitors became especially intense. As Mr. La Plant testified, the opening by plaintiff Ford of its Oakland warehouse would enhance the vigor of competition in the sale of PABCO products at the distributor level. (R. 83). LaPlant also conceded that PABCO supply (including, presumably, the material supplied from Oregon) was important to defendant State and any shortages in supply were met with vigorous complaints on the part of the distributor. (R. 92). Thus, the supply of materials coming into the Northern California market from Oregon had a direct bearing on the vigor of competition between Ford and its defendant competitors, particularly during critical periods of shortages in supply.

Additional evidence of interstate commerce involvement is found in the testimony of Mr. Thomas, president of Ford. Prior to its termination, plaintiff Ford purchased from defendant Fibreboard large quantities of roof insulation. This insulation was manufactured by Kaiser in Camas, Washington, or by United States Gypsum in Pilot Rock, Oregon. The material was then sold to defendant Fibreboard, which in turn would sell it to plaintiff or

other distributors in California. (T. 428-430). The relevant portion of Mr. Thomas' testimony was as follows:

"Q. Let me ask you, Mr. Thomas: Did you buy a product called "roof insulation" from PABCO during the period of time that you distributed their products at San Jose?

A. Yes, sir.

Q. And will you tell the jury what roof insulation is?

A. Roof insulation is the insulation that is put on top of the roof to properly insulate the building. To keep it cool or warm, as the case may be.

Q. Did Fibreboard make the roof insulation you bought from them?

A. No.

Q. Who made it?

A. I believe at the time it was manufactured by Kaiser or U. S. Gypsum.

Q. Gypsum?

A. United States Gypsum Company, as I recall.

Q. One or a series of those companies made this material?

A. Yes, sir, they did.

Q. And where is it made?

A. I believe their plant is in Oregon.

Q. And where is Kaiser's plant that makes this insulation?

A. Kaiser's plant is in Camas, Washington.

Q. And where is United States Gypsum's plant that makes this insulation?

A. I think their plant was in Pilot Rock, Oregon.

Q. And that material was bought by you from Fibreboard here in Martinez?

A. Yes. Fibreboard purchased the product, shipped it to Martinez, rehandled it, and shipped it out to Ford or one of their other customers.

Q. When you say "shipped" it, you mean it was shipped from the manufacturer's plant in either Washington or Oregon to the Fibreboard plant in Martinez?

A. Yes, sir."

(T. 428-430.)

Moreover, Ford bought other products and supplies from manufacturers located outside the state of California. (T. 431-434.) Thus, the termination of plaintiff had a direct impact on the flow of products from Oregon and Washington through Fibreboard to plaintiff Ford in California.

Finally, there was evidence that the termination of Ford affected shipment of roofing materials from California to one of Ford's customers in Medford, Oregon. (T. 434.) A portion of Mr. Thomas' testimony is as follows:

"Mr. Blecher: Q. Now, any of these California contractors—did you have the material delivered outside the state for a job they were working on?

A. Yes, we did.

The Court: I see. At the request of some of your customers you delivered stuff outside the state of California?

The Witness: Yes.

Mr. Blecher: Q. And Fibreboard shipped it for you outside of California?

A. Yes.

The Court: All right."

(T. 435.)

Thus, the record—without any evidence to the contrary—establishes beyond doubt that the conspiratorial termi-

nation of Ford operated directly on the movement of goods purchased and sold by plaintiff in the flow of interstate commerce.

REASONS FOR GRANTING THE WRIT

This petition presents a question of extreme importance concerning the coverage and operation of the federal antitrust laws. Both courts below have ruled that Congress, under the Sherman Act, does not have the authority to reach and regulate a conspiracy between a supplier and dealers of roofing material which was directed toward the cancellation of a lower priced competitor of the conspiring dealers. The courts below ruled that there was not sufficient impact on interstate commerce in our present case to come within the jurisdiction of the Sherman Act even though:

(1) Defendant Fibreboard operated plants and manufactured roofing materials in California and Oregon and shipped materials from its Oregon plant into the relevant California market during periods of shortages when competition between Ford and its competitors was most intense;

(2) Defendant Fibreboard directly sold roof insulation materials to plaintiff Ford, which materials were transported by Fibreboard from Oregon and Washington to Ford's warehouse in California; and

(3) Defendant Fibreboard sold roofing materials to Ford which were delivered by Fibreboard from California to a Ford customer in Oregon.

Petitioner submits that the rulings by the District Court and Court of Appeals below unduly restrict the regulatory reach of the federal antitrust laws contrary to principles established in prior decisions by this court. Further, the rulings below are inconsistent with decisions by other Courts of Appeal throughout the nation thereby creating a conflict among the circuits and confusion as to the nature of impact on interstate commerce necessary to sustain federal jurisdiction under the Sherman Act.

I. THE RULINGS BELOW UNDERMINE THIS COURT'S DECISIONS CONCERNING THE AUTHORITY OF CONGRESS TO REGULATE INTERSTATE COMMERCE AND TO PROHIBIT ANTICOMPETITIVE CONDUCT WHICH RESTRAINS INTERSTATE TRADE AND COMMERCE.

It is fundamental that the Sherman Act, by its terms, is directed at "every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states . . ." (15 U.S.C. §1) and every attempt, or combination or conspiracy to monopolize any part of the trade or commerce among the several states. (15 U.S.C. §2.) The broad language of the statute has been given full and expansive effect by the Supreme Court with the observation that in enacting the Sherman Act, Congress, "left no area of its constitutional power unoccupied; it exercised all of the power it possessed." *United States v. Frankfort Distilleries*, 324 U.S. 293, 298 (1945). The Sherman Act embraces all restraints including those occurring before the interstate journey begins, *Mandeville Island Farm, Inc., et al. v. American Crystal Sugar Co.*, 334 U.S. 219, 233 (1948) during the course of the interstate journey, *Federal Trade Commission v. Stand-*

ard Oil Co., 340 U.S. 231 (1951); or at the end of the interstate journey, *United States v. Chrysler Corporation*, 180 F.2d 557, 559 (9th Cir. 1959).

The significance of the above-cited cases can only be understood in the context of a general analysis of the reach of congressional authority under the commerce clause. In its most recent analysis of this reach of federal jurisdiction the Supreme Court, in *Perez v. United States*, 402 U.S. 146, 150 (1971) stated:

> "The Commerce Clause reaches, in the main three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused . . . Second, protection of the instrumentalities of interstate commerce . . . Third, those activities affecting commerce."

In *Perez*, the issue for the Court was whether interstate commerce was sufficiently involved in a single extortionate credit transaction which occurred wholly within the State of New York. This Court ruled that—in the federal law against "loansharking" Congress attempted to use the full extent of its commerce power. As such, if the class of activity involved substantially affects interstate commerce then Congress can regulate the entire class and also reach individual incidents within the class even though that individual incident does not in and of itself affect interstate commerce. (402 U.S. at pp. 153-154.)

In re-affirming this "class of activities" test, the Court approvingly cited such cases as *Wickard v. Filburn*, 317 U.S. 111 (1943) a ruling that the wheat grown by one farmer wholly for home consumption purposes

> ". . . was constitutionally within the scope of federal regulation because, though never marketed interstate, it supplied the need of the grower which otherwise would have been satisfied by purchase in the open market." (402 U.S. at p. 151.)

As this Court has recently recognized, where the class of activities is within the reach of federal regulation, ". . . the courts have no power to excise, as trivial, individual instances of the class. *Maryland v. Wirtz*, 392 U.S. 183, 193 . . ." *Perez v. United States*, 402 U.S. at p. 154 (1971).

The standards and considerations articulated in cases such as *Wickard, Wirtz* and *Perez* are unquestionably applicable to the appraisal of interstate commerce in antitrust cases. *Mandeville Island Farm, Inc. v. American Crystal Sugar Co., supra; Burke v. Ford*, 389 U.S. 320 (1967). Indeed, in *Mandeville Island*, an antitrust case, the Supreme Court specifically cited *Wickard v. Filburn*, as controlling on the interstate commerce issue. See also: *Gulf Oil Corp. v. Copp Paving Co., Inc., cert. granted*, ... U.S. ....., 94 S.Ct. 1586 (1974) (Opinion below 487 F.2d 202), where this Court granted review as to the issue of interstate commerce under the Robinson-Patman Act and Sections 3 and 7 of the Clayton Act. This Court, however, left standing the ruling of the Ninth Circuit Court of Appeals that there was sufficient impact on interstate commerce to satisfy the jurisdictional requirements of the Sherman Act. In the *Gulf Oil* case this Court will give guidance to lower Federal Courts concerning the question of interstate commerce under the Robinson-Patman Act and Sections 3 and 7 of the Clay-

ton Act. Petitioner Ford respectfully submits that certiorari should be granted in the present case so that a definitive decision can be made giving similar guidance to lower courts with respect to the interstate commerce requirement under the Sherman Act. Such review is especially essential in light of the extremely narrow view of interstate commerce adopted by the courts below in their rulings on this case.

In this context the rulings below are indeed revolutionary, for they mean that Congress does not have the constitutional power—under the commerce clause—to prohibit anticompetitive conduct such as that perpetrated by defendant, Fibreboard in our present case.

Under its constitutional power then, Congress can prohibit a single farmer from growing wheat for home consumption (*Wickard v. Filburn, supra*), it can criminally punish a single act of "loansharking" occurring wholly within one state (*Perez v. United States, supra*), it can prohibit a single act of transporting a woman across a state line for immoral purposes (even though such was not in connection with a commercial prostitution syndicate) (*Cleveland v. United States*, 329 U.S. 14 (1946)), it can prohibit a single incident of racial discrimination where one customer is refused a hotel room or a meal because of his race (*Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964)), and it can criminally punish a price fixing agreement with respect to a single dishwashing machine (*United States v. Bensinger Co.*, 430 F.2d 584 (8th Cir. 1970).) Yet, under the rulings of the courts below, Congress cannot prohibit and the reach of federal

authority may not constitutionally extend to a conspiratorial agreement whereby competitors and a supplier agree and arrange to cut off a source of supply to the plaintiff, even though the defendant—Fibreboard—the manufacturer of the product has plants in two states and supplies the relevant Northern California market, in part, from its Oregon plant, and even though some of the products formerly sold by Fibreboard to plaintiff Ford and its competitors in California originated from Oregon and Washington, and even though some of the past sales of products from defendant Fibreboard to plaintiff Ford involved delivery from Fibreboard in California to Ford's customer located in Oregon.

It is submitted that the lower courts' analysis of Congress' constitutional power under the commerce clause and its restriction on the reach of the Sherman Act cannot stand up under the rulings of this Court. See, for example, *Burke v. Ford*, *supra*. Petitioner knows of no decision in the past thirty years in which this Court has held Congress' constitutional power under the commerce clause insufficient to reach an object of regulation. The Courts' ruling below, therefore, does what this Court has consistently refused to do—to restrict and limit the basic and plenary constitutional authority of Congress to regulate interstate commerce and adverse impacts on competition in the marketplace. The decisions below reverse trends and policies, articulated by this Court recognizing that Sherman Act remedies extend both to (1) restraints upon transactions in the flow or stream of interstate commerce and (2) restraints which substantially *affect* or place a burden upon interstate commerce. *Burke*

v. Ford, 389 U.S. 320 (1967); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948); *Las Vegas Merchant Plumbers Ass'n. v. United States*, 210 F.2d 732, 739 (9th Cir. 1954), *cert. denied*, 348 U.S. 817. Both theories are relevant in establishing the existence of a restraint on interstate commerce in our present case, and each will be discussed in turn.

(A) Defendants' Wrongful Termination of Plaintiff Ford Directly Restrained the Flow of Goods in Interstate Commerce.

The discussion of the evidence in the Statement of Facts, *supra*, is undisputed concerning the movement of roofing materials from defendant Fibreboard's plant in Portland, Oregon, to California distributors such as plaintiff Ford and its competitors in the Oakland, California, area. (T. 80.) It is also clear that roofing materials manufactured by United States Gypsum in Pilot Rock, Oregon, and by Kaiser in Camas, Washington, were purchased by defendant Fibreboard and transported by Fibreboard to California for sale and delivery to plaintiff Ford. (T. 428-430.)

Moreover, there was evidence in the record of Fibreboard selling roofing products to Ford for customers of plaintiff located in Oregon. Fibreboard would itself directly ship these materials from its California plant to Ford's customer in Oregon. (T. 434-435.)

Thus there is no doubt that roofing materials sold by defendant to plaintiff were in the interstate stream or "flow" of commerce. Moreover, in its decision below the

District Court properly stated the applicable legal standard:

> "It is true that, if a restraint occurs within the 'flow' of interstate commerce, substantial effect on interstate commerce then follows as a matter of law and *there is no need to show that any particular amount of interstate commerce was affected* by the restraint." (R. 1021; emphasis added.)

Both courts below, however, chose to disregard the clear evidence of direct interstate flow of materials and erroneously determined that the evidence was not sufficient to establish an interruption in the "flow" of interstate commerce as a result of defendant's violation of Section 1. The Court based this incorrect conclusion on factual premises relating to (1) the interstate movement of insulation materials and (2) Fibreboard's Oregon produced materials sold in the relevant California market. (R. 1022.)

First, the District Court stated (R. 1022) that the insulation material bought by defendant Fibreboard from Kaiser and others (in Oregon and Washington) and transported by Fibreboard to California for sale to plaintiff Ford and its competitors was not a "PABCO" product and hence not covered in the termination notice. Moreover, the court below found that there was no evidence that this insulation material was transported from out-of-state to the marketing plant in California *on a regular basis.* And, finally, the court determined that—after the termination—Ford was able to buy these same insulation materials from suppliers and dealers other than Fibreboard. (R. 1022.)

These factual determinations—even if correct[3]—do not support the District Court's ruling against plaintiff Ford on the interstate commerce issue. The court below was forced to recognize certain facts which are beyond dispute. Prior to the wrongful termination of Ford, plaintiff Ford purchased insulation material from defendant Fibreboard which material was transported by defendant from Oregon and Washington to the relevant California market. After the termination, Ford was not able to purchase these interstate materials from Fibreboard. As the District Court itself conceded, Ford found it necessary to obtain this material from the manufacturer or from other dealers. (R. 1022). The point is, however, that the wrongful termination directly operated to prevent plaintiff Ford from obtaining interstate products from the defendant Fibreboard. The fact that, after the termination, plaintiff was able to purchase materials from another source does not remove the involvement of interstate commerce from the prior relationship between plaintiff Ford and defendant Fibreboard. The wrongful termination of Ford by Fibreboard directly restrained the flow of insulation materials in interstate trade between the two parties. That con-

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[3]A fair reading of the record indicates that the court below appraised the evidence on interstate commerce in the light most favorable to the defendant. Inasmuch as the issue was submitted to the court on the basis of defendant Fibreboard's contention that the evidence was legally insufficient to go to the jury (R. 1124-1125) and considering the verdict in favor of plaintiff Ford on all other aspects of the case, the District Court obviously applied the wrong standard in assessing the record. The evidence must be viewed in the light most favorable to plaintiff. Moreover, the jury's verdict in favor of plaintiff must be reinstated if there is any substantial evidence supporting the presence of involvement of interstate commerce with respect to defendants' anticompetitive conduct. *Las Vegas Plumbers Ass'n. v. United States, supra,* 210 F.2d at p. 742.

sideration—standing alone—is sufficient to satisfy federal jurisdictional and constitutional requirements and to bring the Sherman Act remedies into play.

Once it is established that the defendants' termination of plaintiff operated directly on goods which, prior to the termination, "flowed" from defendant Fibreboard to plaintiff Ford "in interstate commerce", the small quantity of the materials involved, the irregularity of the flow and the possible alternative sources of supply are insufficient bases to displace federal jurisdiction and Sherman Act coverage. It was recognized in the *Las Vegas Merchant Plumbers Ass'n.* case, *supra*, 210 F.2d at p. 748: "the test of impact on commerce is qualitative, not quantitative . . . Section 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected". (Citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225.)

In another context, federal reach under the Commerce Clause has been held sufficient to prevent practices of racial discrimination by restaurants which purchase food supply in interstate commerce, even though there is no showing—in a specific case—that the act of discrimination reduced the flow of food in interstate commerce. *Katzenbach v. McClung, supra.* Thus, a restaurant owner's argument that his Negro customer could purchase the "interstate" food he desires from other sources of supply (i.e., other restaurants or grocery stores) does not defeat federal jurisdiction. And the same rule applies to defendant Fibreboard which wrongfully refused to sell interstate materials to Ford, notwithstanding alternative sources of supply.

The second set of factual premises relied upon by the courts below concerns defendant Fibreboard's production of roofing materials in Portland, Oregon, for transportation and sale in the relevant California market. Again, the courts rejected this obvious "flow" of goods in interstate commerce as a basis for satisfying the federal jurisdictional requirement. The District Court stated that there was no evidence as to the amount or regularity of these interstate deliveries to and sales in the relevant California market. (R. 1022.) Moreover, the court ruled that there was no evidence that these interstate materials were sold to plaintiff. (R. 1022.) This latter observation is most remarkable in light of the undisputed evidence that the Portland, Oregon, plant was defendant Fibreboard's second most important operation (next to its Martinez plant) for purposes of supplying dealers in the Northern California area. (T. 182-183.) Mr. LaPlant, a Fibreboard official candidly admitted specific recollection of Oregon produced roofing materials being sold to defendant State Shingle, a competitor of plaintiff Ford. (T. 80.) Not surprisingly, Mr. LaPlant had no specific recollection as to whether or not Oregon-produced materials were sold to plaintiff. (T. 80-83.) However, in light of defendant's concessions that the Oregon plant was Fibreboard's second most important supply source for Northern California customers and the specific recollection of sales to the State Shingle, the jury could properly and reasonably have found that prior to the termination, Fibreboard also sold Oregon-produced materials to plaintiff Ford.

The importance of the Oregon-produced materials on competitive conditions in the Northern California market is emphasized by the District Court's specific recognition that Oregon materials were used to meet California demand when there were temporary shortages of materials at the Martinez plant. (R. 1022.) It was during these supply shortages that plaintiff Ford's competitors vigorously complained to Fibreboard. (T. 92.) The jury, then, could have found that the supply of roofing materials from Fibreboard's Portland, Oregon, plant exerted an extremely substantial and important impact on competition between plaintiff Ford and the very competitors which acted in concert with defendant Fibreboard in forcing the termination of Ford.

Thus, not only did defendant's conduct directly restrain the interstate flow of roofing materials between Fibreboard and Ford, it also operated directly on materials, the flow of which in interstate commerce, had a crucial impact on competition between Ford and its competitors. Moreover, the termination of plaintiff Ford was directly related to its opening of a warehouse in Oakland which would—according to Mr. LaPlant of Fibreboard—enhance the vigor of competition in the relevant market (R. 83); this, of course, would include competition *vis a vis* the Oregon-produced material.

The two sets of factual premises relied upon by the District Court and accepted by the Court of Appeals (as discussed above) fail completely to take into account a third line of evidence offered by plaintiff which, standing alone, demonstrates that defendant's wrongful termina-

tion of Ford directly interfered with the flow of roofing materials in interstate commerce. Prior to Fibreboard's wrongful termination of Ford, Ford purchased roofing materials which Fibreboard delivered directly to plaintiff's customer in Oregon. (T. 434-435.) Obviously, after Fibreboard terminated Ford's source of supply, interstate sales and shipments by Fibreboard to Ford's Oregon customer ceased. This again demonstrates a direct impact on the interstate "flow" of roofing materials as a result of the wrongful termination.

Notwithstanding the above undisputed evidence of defendant Fibreboard's direct interstate shipments and sales to plaintiff Ford, its customers, and its competitors, the District Court ruled that:

> (1) "There is no substantial evidence of any significant interference with any roofing materials which could be fairly said to have been 'in the flow' of interstate commerce." (R. 1024) and;
>
> (2) "Even assuming that there was a *per se* violation in this case and further assuming[4] that the Oregon and Washington items were such that ordinarily they could be held to have remained within the flow of interstate commerce, the evidence in this particular case is so meager as to be insufficient to support any finding other than that these items were ". . . so 'miniscule' as to make it readily apparent that any combination here involved was directed, not at interstate activity, but at intrastate activity." (Citing the "de minimis" ruling of the Ninth Circuit

[4]These so-called "assumptions" are compelled by the state of the record inasmuch as the jury could well have found such "assumptions" to be facts.

case, *Yellow Cab Co. of Nevada v. Cab Employees, Local #881,* 457 F.2d 1032 (9th Cir. 1972).) (R. 1025.)

The District Court thus contradicted itself. The Court first recognized that some roofing materials moved directly from Fibreboard in interstate commerce to Ford, its customers and competitors and that under the "in flow" theory of jurisdiction ". . . the test is qualitative, rather than quantitative, and there need be no showing of a substantial affect of the restraint upon interstate commerce." (R. 1020.) The court then ruled that plaintiff Ford did not demonstrate enough of an impact on interstate commerce. The rulings below, therefore, undermine the effectiveness and reach of the Sherman Act in establishing free and open competition as the economic policy of the nation.

As this Court stated, in *United States v. Socony Vacuum Oil Co.,* 310 U.S. 150 at p. 225 (Note 9): "The amount of interstate or foreign trade involved is not material, since Section 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected." To the same effect, see *United States v. McKesson & Robbins, Inc.,* 351 U.S. 305, and *Safeway Stores, Inc. v. Federal Trade Commission,* 366 F.2d 795 (9th Cir. 1966).

Or, as stated more directly by Mr. Justice Jackson in *United States v. Women's Sportswear Mfr. Assn.,* 336 U.S. 460, 464 (1949):

> "Restraints, to be effective, do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intra-

> state, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."

While the agreement to terminate Ford was a wholly local transaction, the very nature of the agreement was to preclude Ford from buying Fibreboard products—including those which defendant brought to the Bay Area from Washington and Oregon in interstate commerce, and those which were sold from California to Ford's customer in Oregon.

In *Binderup v. Pathe Exchange*, 263 U.S. 291 (1923), as in our case, the wrongful termination of the plaintiff operated to disrupt the interstate flow of goods between defendant and plaintiff. In our case, as in *Binderup*, it is difficult to imagine a more direct restraint of interstate commerce. The termination of plaintiff directly prevented it from purchasing from Fibreboard and from reselling (in and out of California) products made in Washington and Oregon. Thus Ford's termination as a distributor directly restrained the flow of goods in interstate commerce.

The list of cases applying the direct restraint or "in flow" commerce test to even a single retailer include, among others, *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Radiant Burners, Inc. v. People's Gas Light and Coke Co.*, 364 U.S. 656 (1961); *Bragen v. Hudson County News Co.*, 168 F.Supp. 231 (N.J. 1958)

reversed on other grounds, 321 F.2d 832 (4th Cir., 1960) and a District Court decision in *Bailey's Bakery, Ltd. v. Continental Baking Co.*, 235 F.Supp. 705 (Hawaii 1964).

To uphold the rulings below, this Court would have to reject an interminable line of decisions holding that the commerce requirement is satisfied when a basically local seller is deprived of goods which originated outside of the state in which he transacts most of his business. As the Court has observed, interstate commerce comprehends ". . . trade in any and all its forms including the transportation, purchase, sale and exchange of commodities". *Welton v. Missouri*, 91 U.S. 275, 280; *United States v. South-Eastern Underwriters Ass'n., supra*, 322 U.S. 533, at p. 551 (n. 34).

(B) The Quantity of Out of State Roofing Materials Involved in This Case Was Sufficient to Satisfy Sherman Act Jurisdictional Requirements.

It has already been established herein that where there is a *per se* violation of the Sherman Act which affects goods in the flow of interstate commerce, the quantity of the goods involved is immaterial. On that point alone, the rulings of the District Court and Court of Appeals below should be reversed. Plaintiff Ford demonstrated at trial that prior to termination it purchased Oregon and Washington-produced roofing materials from Fibreboard and also that Fibreboard had shipped California materials to Ford's customer in Oregon.

Moreover, Ford's termination stemmed from its announced plan to open an Oakland facility (a move which enhanced the vigor of competition in the area), thus the

competitive impact of the termination cannot be denied. Moreover, the roofing materials manufactured by Fibreboard in Oregon and sold and delivered in the Northern California market were of particular importance during periods of shortages. It was at this time that the competition between Ford and other distributors grew so intense. Therefore, it is clear that Fibreboard's termination of Ford and the resultant foreclosure of the Oregon supply bore directly on the vigor of competition in the relevant Northern California market.

In other words, it cannot be denied that the Fibreboard products supplied from Oregon (during periods of shortages in materials) had a direct bearing on the vigor of competition in the Northern California market. This Court considered a similar situation in *Simpson v. Union Oil Co.*, 377 U.S. 1, 16 (1963) where a single gasoline station dealer successfully complained of price-fixing. In upholding Sherman Act jurisdiction the Supreme Court recognized that ". . . there is actionable wrong *whenever the restraint of trade or monopolistic practice has an impact on the market;* and it matters not that the complainant may be only one merchant." (377 U.S. at p. 16; emphasis added). This same view was adopted by the Fifth Circuit in *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26 (5th Cir. 1972).

Thus, in our present case, the competitively important interstate supply of materials flowing from defendant Fibreboard to plaintiff Ford, its customers and its competitors—regardless of the relatively small quantity or irregularity of shipments—cannot be considered insignificant, "minuscule" or "*de minimis*" in its impact on

the roofing dealers (such as plaintiff Ford and its competitors) in the relevant market. Fibreboard's Oregon-produced roofing material was important to the dealers in the Northern California market during shortages—that is when competition was most vigorous. The interstate supply was, therefore, clearly significant to competitive conditions in the relevant market. And Fibreboard's wrongful termination of Ford was a restraint of trade which had an impact on the market.

The Supreme Court in a recent unanimous decision has recognized that when competition is reduced, prices increase and unit sales decrease. It can therefore be assumed that fewer purchases from interstate suppliers will result. The reduction of competition thus "inevitably" affects interstate commerce. *Burke v. Ford, supra,* 389 U.S. at p. 322.

In our case, when Fibreboard terminated dealings with Ford it had one less customer to supply. This reduced the demand on Fibreboard and made shortages of materials less likely (or, at least, less frequent); hence, there would necessarily be less need to supply the California market from the Oregon plant, an inevitable reduction in Fibreboard's interstate sales and delivery.

The District Court, in characterizing the interstate activity as "de minimis" (R. 1026) (citing *Yellow Cab Co. of Nevada v. Cab Employers, Local No. 881, supra*) erred in yet another respect. Under the "class of activities" test used by the Supreme Court to assess impact on interstate comerce, it is not proper to focus solely on the interstate effect of the parties before the Court. Instead, the activities of the particular plaintiff and de-

fendant in a given case must be viewed as one example of a more general class of activity. The "interstate" element is satisfied if the overall class of conduct—taken cumulatively—has an impact on commerce among the states. For example, it would be impossible to show that race discrimination against one interstate traveler has anything other than a "minuscule" or "de minimis" effect on interstate commerce. The same is true of the transportation of one item of stolen goods or of the failure to pay a minimum wage to one maintenance employee, or of the growing of wheat for home consumption, or of one single "loanshark" transaction. No one of the above acts—standing alone—has a substantial impact on interstate commerce. Yet each and every case set forth as examples (and hundreds of similar ones) have been recognized as being within the reach of congressional regulation under the commerce clause. *Heart of Atlanta Motel v. United States, supra; Maryland v. Wirtz, supra; Kirschbaum v. Walling,* 316 U.S. 517 (1942); *Wickard v. Filburn, supra; Perez v. United States, supra.*

The relevant test, then, is—can Congress reach the general category of conduct involved? If so, the pertinent congressional regulation will apply to the specific instance before the Court.

To apply this principle to our case is enlightening. Congress, through the Sherman Act, has prohibited all concerted refusals to deal. See *Klor's Inc. v. Broadway-Hale, supra; United States v. General Motors Corp., supra.* Thus, Congress has made a judgment that such concerted terminations as a class of activity creates a substantial burden on the free flow of goods in interstate

commerce. The correctness of this Congressional determination is too obvious to be denied. Under the commerce power, all concerted refusals may then be prohibited by federal law if Congress chooses to utilize the full extent of its constitutional authority over interstate commerce (as it has with respect to the Sherman Act). Once it is recognized that Congress may prohibit *all* concerted refusals, because all such refusals cumulatively generate a substantial and adverse impact on interstate commerce, then the federal prohibition may be applied to any single instance (such as our present case) of the general class of activity involved. There need be no showing that the single incident, standing alone, had a substantial effect on commerce. *Wickard v. Filburn, supra; Perez v. United States, supra.*

The District Court's use of the "de minimis" standard and its reliance on the *Yellow Cab* case were therefore erroneous because once it is recognized that the general class of conduct (i.e., concerted refusals to deal) cumulatively has a substantial impact on interstate commerce, ". . . the courts have no power to excise, as trivial, individual instances of the class". *Maryland v. Wirtz,* 392 U.S. at p. 193; *Perez v. United States,* 402 U.S. at p. 154.

II. BY ITS RULING BELOW, THE NINTH CIRCUIT COURT OF APPEALS HAS CONTINUED TO FOLLOW A VIEW OF IMPACT ON INTERSTATE COMMERCE WHICH CONFLICTS WITH RULINGS BY COURTS IN OTHER CIRCUITS.

The rulings below follow, cite, and rely upon other Ninth Circuit decisions—such as *Page v. Work,* 390 F.2d 323 (9th Cir. 1961) and *Yellow Cab Co. of Nevada v.*

Cab Employees Local No. 881, 457 F.2d 1032 (9th Cir. 1972)—which narrowly and, we submit, erroneously, construe the concept of interstate commerce. As such the *Ford* case adds yet another Ninth Circuit precedent restricting the regulatory reach of the Sherman Act.[5] Numerous recent decisions by Courts in other Circuits make it clear that these Ninth Circuit rulings are out of line with the mainstream of judicial construction of Sherman Act jurisdiction.

Recently, the Fifth Circuit Court of Appeals, in *Lehrman v. Gulf Oil Corp., supra*, found the interstate commerce element satisfied as to an anticompetitive practice aimed at a service station dealer who sold gasoline which had been produced in the same state. Our present case is peculiarly akin to *Lehrman*. That case was brought by a terminated Gulf Oil dealer who failed to comply with Gulf's "suggested" prices. In affirming the plaintiff's entitlement to treble damages (though reversing for a new trial only on the issue of damages) the Fifth Circuit rejected Gulf's argument that the requisite connection between the restraint and interstate commerce had not been established. There, not unlike here, the evidence on commerce consisted of the uncontradicted testimony of the defendant's manager to the effect that many Gulf products sold by the plaintiff at retail originated in the State of Texas.

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[5]Prior to the *Ford* ruling, the Ninth Circuit Court of Appeals seemed to be following the prevailing view of liberally construing the interstate commerce requirement under the Sherman Act. See *Rasmussen v. American Dairy Ass'n.*, 472 F.2d 517 (9th Cir. 1973); *Copp Paving Co., Inc. v. Gulf Oil Corp.*, 487 F.2d 202 (9th Cir. 1973); *Rosen v. Rossmoor Corp.*, ... F.2d ..... (9th Cir. No. 26,475, Oct. 17, 1973). But the present ruling in *Ford* reaffirming *Page v. Work, supra*, and the *Yellow Cab Co. of Nevada* case, *supra*, puts the Ninth Circuit back on an erroneous and inconsistent path *vis a vis* the other Circuits.

In rejecting Gulf's reliance on the Ninth Circuit *Page v. Work* decision, the Court said:

> "The rationale is inapplicable to Lehrman. Gulf's actions killed off Lehrman's business permanently. There has been a reduction in Gulf's interstate purchase of tires, batteries and accessories because, even if the absolute level of such purchases remained constant after Lehrman went out of business, interstate TBA purchases would have reached above the constant had Lehrman continued in operation. There is no indication that Gulf's interstate purchases of TBA items are oblivious to fluctuations in the number of its operating retailers in these times of sophisticated, data-sensitive corporate management.
>
> We do not accept the suggestion that *Page v. Work* holds, as a matter of law, that a conspiracy to restrain trade in an intrastate product cannot, as a matter of law, affect trade in another, interstate product sufficiently to trigger Sherman Act jurisdiction. *The focus of the act is to protect interstate trade from interference of all degrees of subtlety. The concept of interstate commerce is a practical one. The interstate nerves of a local business can be deadened swiftly by a conspiracy the object of which happens to be the intrastate aspect of a plaintiff's business.* We see no reason why the federal courts should confine themselves to protecting against interferences with interstate commerce which, quite fortuitously, turn out to have motivated the actions of a defendant. It is the effect on commerce that determines federal jurisdiction under the Sherman Act and not any notion of the 'interstate culpability' of those who engage in anticompetitive practices. *No matter how intrastate the objects of anticompetitive conspirators, they must take their victims' involve-*

ment in intrastate commerce as they find them." (464 F.2d at p. 36. Emphasis added.)

Even though the principal impact of Fibreboard's illegal combination was on plaintiff Ford's intrastate operation, the termination did in fact cut off plaintiff's then current source of supply of certain roofing materials from Oregon and Washington. The "interstate nerves" of Ford's business operation were "deadened" by defendant's illegality. While it is true that in *Lehrman* the plaintiff was driven completely out of business, plaintiff Ford in our case managed to survive and to continue in business. Nonetheless, here as in *Lehrman,* there is in the record below uncontradicted evidence presented that as a result of defendants' wrongful termination of plaintiff Ford:

1. Fibreboard's total sales to Bay Area distributors declined;

2. Fibreboard's sales to Bay Area distributors included, as a secondary source of supply, material shipped into California from Oregon;

3. Fibreboard purchased less roofing insulation from Kaiser and Simpson from their plants outside of California because plaintiff was no longer a purchaser of these materials *from defendant;*

4. Plaintiff could no longer supply out-of-state customers with Fibreboard products manufactured in California.

In short, there was a reduction *in Fibreboard's interstate activities*—which is not affected by the fact that plaintiff remained in business and continued to purchase

materials from other suppliers. Thus, just as in *Lehrman,* "The requisite effect on interstate commerce would still result from a *reduced or altered* flow of goods into the State of . . ." California. Just as in *Lehrman,* "there is no indication that (Fibreboard's) interstate purchases of (insulation or other roofing materials) are oblivious to fluctuations in the number of its operating (wholesalers) in these times of sophisticated, data-sensitive corporate management." (464 F.2d at p. 36.)

Thus, the Ninth Circuit ruling below conflicts with the Fifth Circuit Decision in *Lehrman.* See also: *Cook v. Ralston Purina Co.,* 1974 CCH Trade Cases ¶74,943 (M.D. Ga. 1974) where the interstate commerce requirement was found to be satisfied in a case, where similar to our case, defendant produced most of its product in Georgia and made local sales to plaintiff, a Georgia customer. The Court noted, however, (as in our case) that defendant was an interstate operator and some of the products passing through defendant's warehouse and into the relevant market were produced in other states. Contrary to the result in our case, the *Cook* court specifically refused to apply the "de minimis" rule stating that any restraint on the flow of interstate commerce adversely affects interstate trade as a matter of law in violation of the Sherman Act.

The Ninth Circuit ruling below also conflicts with the Eighth Circuit decision in *United States v. Bensinger Co.,* 430 F.2d 584, 589 (8th Cir. 1970):

> "The subject of the conspiracy was only one dishwashing machine, and the price at which this $10,000 machine was fixed was only $107 above the dealers'

> cost. Nevertheless, this Court is not willing to say that large price-fixing conspiracies in interstate commerce are violations of the Act, while little ones are not; *the law condemns them all*". (Emphasis added.)

And further:

> "the fact that the conspiracy was a failure and did not bear fruit does not preclude jurisdiction to punish the conspiracy."

III. BECAUSE OF THEIR FAILURE TO RAISE THE INTERSTATE COMMERCE ISSUE PRIOR TO TRIAL AND THEIR FAILURE TO COOPERATE THEREAFTER IN THE DISCOVERY OF FACTS RELEVANT TO THAT ISSUE, DEFENDANTS SHOULD BE PRECLUDED FROM DENYING THAT THEIR ANTICOMPETITIVE CONDUCT HAD A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE.

The rulings below also present important questions as to compliance with Rule 16 of the Federal Rules of Civil Procedure and the problems involved when "surprise" issues are injected into the trial of a federal case. The "interstate commerce" issue was not even properly before the District Court. Defendant Fibreboard failed to raise the issue in its motion for summary judgment, or its pretrial statement, or its trial brief. Nor was the issue mentioned in the pre-trial order. Under F. R. Civ. P., Rule 16 defendant should have been precluded in the interest of justice from raising this "surprise" issue at trial. *Walker v. West Coast Fast Freight, Inc.*, 233 F.2d 939 (9th Cir. 1956). Defendant's belated raising of this issue prejudiced plaintiff's ability to discover and present evidence of the impact on interstate commerce as a result of defendant's wrong.

At the very least, this Court should reverse the grant of judgment notwithstanding the verdict and remand the case for a full and fair trial on the sole issue of the effect of defendant's conduct on interstate commerce.

CONCLUSION

For the reasons stated above, Petitioner Ford respectfully requests that the Court grant this petition for writ of certiorari.

Dated, June 21, 1974.

Respectfully submitted,

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(Appendices Follow)

Appendix A

United States District Court
N. D. California

No. 45977

Ford Wholesale Company Inc. of San Jose, a corporation,
Plaintiff,
vs.
Fibreboard Paper Products Corporation, et al.,
Defendants.

[May 15, 1972]

MEMORANDUM OF DECISION ON DEFENDANTS' MOTION FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT INSOFAR AS SAID MOTIONS INVOLVE THE ISSUE OF INTERSTATE COMMERCE

SWEIGERT, District Judge:

Plaintiff contends (Brief of 12/13/71, pp. 32-33) that, since defendant failed to note interstate commerce in its pretrial statement as one of the issues in dispute, defendant is estopped to dispute plaintiff's allegation of interstate commerce.

Both parties filed pretrial statements herein, plaintiff on February 18, 1970 and defendant on April 6, 1970 and thereafter presented a proposed pretrial order based on

their pretrial statements, approved by both parties as to form and approved by the court on November 4, 1970.

Neither plaintiff nor defendants adequately complied with Local Rule 105(a) (3), (4) which requires a plain, concise statement of undisputed facts and of each issue of fact which a party claims or concedes to be in dispute. Neither plaintiff nor defendants clearly indicated either in their respective pretrial statements or in the approved pretrial order whether interstate commerce was or was not a disputed issue in the case. (See Pre-Trial Order Par. 3(a) (h), "Undisputed Facts," Par. 4(A-B) "Disputed Facts" and Par. (11) "Stipulations").

Certainly, there is nothing in the record to justify plaintiff's contention that any deficiency of evidence to support his interstate commerce allegation is due to plaintiff having been misled concerning the existence of the issue. There is no more reason to hold defendants estopped from raising the issue than there is reason to hold plaintiff estopped from avoiding the issue.

During a session with the trial judge concerning jury instructions, defendants' counsel took the position that the commerce question presented a straight law question for the court as to whether plaintiff had offered evidence sufficient to justify a jury finding that interstate commerce was involved. Defendant, who had submitted no instructions on the subject contended that no sufficient evidence had been offered and that there was, therefore, no commerce issue for the jury and that the issue should be withdrawn from the jury and ruled upon by the court.

Thereupon, counsel for plaintiff, although contending that there was sufficient evidence of interstate commerce,

joined in defendants' suggestion that the interstate commerce issue be left for ruling by the court and withdrew its instructions on the subject of interstate commerce.

We proceed, therefore, upon what we regard as, in effect, a stipulation of the parties that the court, not the jury, should make the ruling upon the interstate commerce issue in this case.

Clearly, plaintiff concedes his understanding that the court was to decide the issue whether there was sufficient evidence to justify a jury finding that interstate commerce was involved. (Pltf's Brief, 12/13/71 p. 25).

PLAINTIFF'S THEORY RE INTERSTATE COMMERCE

Plaintiff Ford was engaged in the business of distributing roofing products only in the California Counties of Santa Clara, Alameda, San Francisco, Contra Costa, Monterey and San Mateo. (Pretrial Order of December 7, 1970).

Defendant Fibreboard manufactured Pabco roofing products at the California cities of Martinez, Redwood City, Emeryville, Wilmington. It also had a plant in Portland, Oregon. (Pretrial Order of December 7, 1970). (Undisputed facts).

During the years from about 1961 until October 29, 1963, when Fibreboard terminated Ford (as of 12/31/63) as one of its distributors, Ford had regularly purchased from Fibreboard, under a merchandising policy statement (Pltf's Ex. 2), certain Pabco Asphalt Roofing Products at Fibreboard's Martinez, Contra Costa County plant, where the products were manufactured. Ford then retailed them to its customers within the six San Francisco Bay Area counties.

Since these Pabco Asphalt Roofing Products had been manufactured by Fibreboard, not outside of California, but right in Fibreboard's Martinez plant and had been there sold to Ford for redistribution wholly in local commerce, these intrastate transactions would not support interstate commerce jurisdiction in this case—unless plaintiff could show that the transactions, although wholly intrastate, did in some way substantially affect interstate commerce.

Plaintiff, however, makes no such contention in this case nor is there any evidence that these intrastate transactions actually affected interstate commerce substantially or otherwise.

Plaintiff, therefore, has staked his jurisdictional interstate commerce claim in this case upon some evidence in the record to the effect that, apart from the Pabco Asphalt Roofing Products manufactured at Martinez and sold *intrastate* to Ford, Fibreboard had some other items on hand at its Martinez plant which had come from out of state and which, plaintiff claims, were such as to bring Fibreboard's termination of the parties' otherwise intrastate transactions and relationships so "within the flow" of interstate commerce as to indicate substantial effect on interstate commerce *as a matter of law* without need for plaintiff to show any actual effect, substantial or otherwise, on interstate commerce. (See, Las Vegas Merchant Plumbers Assn. v. United States, infra)

We agree with plaintiff that Las Vegas Merchant Plumbers Assn. v. United States, 210 F.2d 732 (9th Cir. 1954) has well established the law to the effect that "A case under the antitrust laws, so far as the interstate commerce element is concerned may rest on one or both of two the-

ories: (1) That the acts complained of occurred *within the flow* of interstate commerce. This is generally referred to as the 'in commerce' theory. (2) That the acts complained of, occurred wholly on the state or local level, in *intrastate* commerce, but substantially affected interstate commerce. Under both of these theories, the transactions complained of must affect or have an effect on interstate commerce or the requirements of the statute are not satisfied."

It is also true that *Las Vegas* Merchant Plumbers Assn., at pp. 748, 749, holds that, where the restraint complained of does occur "within the flow" of interstate commerce, then the test is qualitative, rather than quantative, and there need be no evidentiary showing of a substantial effect of the restraint upon interstate commerce (as would be necessary under (2), i.e., the quantitative test) since in such case, i.e., as to violations per se occurring in the stream of interstate commerce, "the proscribed and substantial effect of these illegal acts followed as a matter of law."[1]

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[1]It will be noted, however, that the *Las Vegas Merchant Plumbers Assn.* case reached this conclusion in a context involving alleged price fixing—a per se antitrust violation.

The question arises whether the same presumption of law would follow in a case where the evidence would support, not a per se antitrust violation, but, at best, a violation based upon the test of the unreasonableness of the restraint.

The court in *Las Vegas Merchant Plumbers Assn.* (pp. 748, 749) indicated that this presumption is limited to cases where the restraint complained of, not only occurs within the flow of interstate commerce, but is also a per se type of restraint.

In Yellow Cab Company of Nevada v. Cab Employers, Automotive & Warehousemen, Local # 881, 457 F.2d 1032 (Ninth Circuit, 1972), our Ninth Circuit again recently recognized this limitation when it referred to "the well-settled rule that, where the activities are interstate in nature, a per se violation of the Sherman Act presumes, as a matter of law, an effect upon interstate

It is true that, if a restraint occurs within the "flow" of interstate commerce, substantial effect on interstate commerce then follows as a matter of law and there is no need to show that any particular amount of interstate commerce was affected by the restraint.

The question here, however, is whether there was any such "flow" or stream of interstate commerce. Certainly, there should be some substantial evidence to establish the premise that there was in fact a "flow" of *interstate* commerce that was interrupted by the restraint.

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commerce, thus negating a showing of the amount of commerce involved."

This same limitation is also noted in United States v. Bensinger Co., 430 F.2d 584 (8th Cir. 1970) (recently cited but factually distinguished in Yellow Cab Company v. Cab Employers, etc., supra. In *Bensinger* the court held the law to be that, even where the alleged conspiracy occurs within the flow of commerce, the interstate commerce issue further depends upon whether the restraint was a per se antitrust violation, e. g., price fixing, which requires no further showing of the reasonableness of the effect on interstate commerce or whether it was the kind of conspiracy which is subject only to the test of "reasonableness." If the former, said the court, then, of course, there would be no need to show that the effect on interstate commerce was direct and substantial because that would follow as a matter of law. Where, however, the conspiracy, although occurring within the flow of commerce, is of a kind which is subject to the test of reasonableness, then, of course, that test must be met and it must be shown that the restraint in question was under all the circumstances an "unreasonable" restraint upon interstate commerce.

Although, at plaintiff's request, we instructed the jury upon a per se theory of the case as well as upon a reasonableness theory, we are convinced that there is no substantial evidence to support a per se restraint within the meaning of Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969) and that at best the evidence in this case would support only a restraint found to be "unreasonable" under the circumstances.

If these cases correctly state the law, we would have to conclude that, even assuming the restraint to have occurred "within the flow of interstate commerce," still, since there was no *per se* violation, plaintiff could not claim the presumption of law that the restraint substantially affected interstate commerce.

For reasons apparent in our memorandum, it is not necessary to rest our ruling upon a resolution of that question.

The Evidence Re Plaintiff's Interstate Commerce Theory

The other items relied upon by plaintiff to show a "flow" of *interstate* commerce as a premise for a *presumption of law* that such commerce was substantially affected are in effect as follows:

(1) Some "insulation material" manufactured, not by Fibreboard, but by others (Kaiser and Simpson) in Oregon and Washington, bought there by Fibreboard and brought to its Martinez plant at unspecified times and in unspecified amounts. This was not a Pabco product and there is no evidence that it was among the kind of products listed in the Fibreboard distribution policy statement (Ex. 2) or covered by the termination notice. Nor is there any evidence that this insulation material was brought to Martinez with any degree of regularity. There is some evidence that Ford (in addition to purchasing this insulation material directly from its manufacturer) had on occasion purchased some from Fibreboard's Martinez plant but there is no evidence as to when or in what amount. There is, no the other hand, evidence that, after Fibreboard's termination of Ford as one of its wholesale distributors, Ford continued to obtain this insulation material—either from its manufacturer or from other dealers—in the same manner as before the termination.

(2) Some other items, generally described as "specialty roofing materials" which had been made in Fibreboard's Portland, Oregon plant and on occasion brought to Martinez at unspecified times and in unspecified amounts (apparently when there had been a temporary shortage of

material at the Martinez plant during its start-up period). There is no evidence as to the nature of these items (i.e., whether they were Pabco Asphalt Roofing materials or any of the four products listed in Fibreboard's statement of its merchandising arrangements with plaintiff Ford and its other distributors. (Pltf's Ex. 2). Nor is there any evidence that any such transfers were regularly made. Even more importantly, there is no evidence that Ford had ever ordered or purchased any of these particular items from Fibreboard.

Plaintiff Ford contends, however, that upon this evidence, it could be found that Fibreboard's refusal to continue Ford as a distributor of its Pabco Asphalt Roofing Products, manufactured in the Martinez plant, became a transaction occurring "in the flow" of interstate commerce, in that Fibreboard's termination precluded Ford "from purchasing from Fibreboard products made in Washington and Oregon. . . ." (Pltf's Brief of 12/13/71 at p. 30).

As to (1) supra, i.e., the "insulation material" brought by Fibreboard from Oregon and Washington, it is difficult to understand from the evidence above summarized how plaintiff can seriously contend it was precluded by the termination of its distributorship from obtaining such insulation material when that material was not even a subject of the distributorship or the termination thereof.

This evidence, as thin as we have ever seen on an interstate commerce issue, falls far short of supporting a finding that defendants' termination of the parties' otherwise intrastate transactions and relationship occurred "within the flow" of interstate commerce.

As to (2) supra, some so-called "specialty" items brought from Fibreboard's Portland plant to its Martinez plant on some occasion, it is difficult to understand from the evidence above summarized how plaintiff can contend that it was precluded by the termination from obtaining those items—when there is no evidence that it ever did either order of receive any of them.

Here again, we conclude that this evidence is so thin as to fall far short of supporting a finding that defendants' termination of the otherwise intrastate transactions and relationship of the parties occurred "within the flow" of interstate commerce.

Upon the record in this case there is no substantial evidence that the termination significantly interrupted Ford's ability to obtain roofing material *except* the Pabco Asphalt Roofing Products manufactured at Martinez which it had been theretofore regularly receiving in an *intrastate* relationship under the terms of its Pabco distributorship arrangement.

There is no substantial evidence of any significant interference with any roofing materials which could be fairly said to have been "in the flow" of interstate commerce.[2]

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[2]It is not necessary to rest our ruling on a determination of a further question, raised by defendants, i. e., whether the out-of-state items brought to Martinez had ceased to be in interstate commerce when they "came to rest" in Fibreboard's Martinez plant.

Plaintiff, relying mainly on such cases as Binderup v. Pathe Exchange, Inc., 263 U.S. 291 at 309-311, 44 S.Ct. 96, 68 L.Ed. 308 (1923) and Walling v. Jacksonville Paper Co., 317 U.S. 564, 63 S.Ct. 332, 87 L.Ed. 460 (1943) contends that these two items from Oregon and Washington could be considered to have remained in the flow of interstate commerce. The court in Lo Cicero v. Humble Oil & Refining Company, 319 F.Supp. 1133, 1137 (E.D.La.1970), after consideration of Walling v. Jacksonville Paper Co., supra; Mitchell v. Livingston & Thebaut Oil Company, 256 F.2d 757 (5th

Even assuming there was a per se violation in this case and further assuming that the Oregon and Washington items were such that ordinarily they could be held to have remained within the flow of interstate commerce, the evidence in this particular case is so meagre as to be insufficient to support any finding other than these items were (as in the recent case of Yellow Cab Company v. Cab Employers, supra n. 1) so "miniscule" as to make it readily apparent that any combination here involved was directed, not at any interstate activity, but at intrastate activity.

Cir. 1958); Allesandro v. C. F. Smith Co., 136 F.2d 75 (6th Cir. 1943), summarizes the rules as follows:

Generally, under "flow of commerce" principles, goods shipped into a state are considered to remain within the flow under three circumstances: where they are purchased by the wholesaler or retailer upon the order of a customer with the definite intention that the goods are to go at once to the customer; where the goods are purchased by the wholesaler or retailer from the supplier to meet the needs of specified customers pursuant to some understanding with the customer although not for immediate delivery; and where the goods are purchased by the wholesaler or retailer based on anticipated needs of specific customers, rather than upon prior orders or contracts. In *Lo Cicero*, the court adds that the test is whether the warehouseman acts as an independent businessman or as an agent of the manufacturer, citing Mitchell v. Livingston & Thebaut Oil Company, 256 F.2d 757 (5th Cir. 1958), and on the nature of his customer, citing Walker Oil Co. v. Hudson Oil Co. of Missouri, 414 F.2d 588 (5th Cir. 1969), also a Robinson-Patman Act case.

Applying these tests to our present case, there is no evidence in the record that any of the items from Oregon and Washington were stored in Fibreboard's Martinez warehouse pursuant to any arrangement falling within the first two categories above set forth.

As to those items the best that could be contended is that they fell within the last category, i. e., they were brought to Martinez by Fibreboard, acting as a wholesaler, to serve the anticipated needs of specific customers—although not upon prior orders or contracts.

However, since neither the "insulation" material nor the "other" roofing material from Portland have been shown to be items covered by the Fibreboard Distribution Policy Statement, or to have been significantly requested or purchased by any specific distributor, including Ford, there is insufficient basis for holding that they were brought to Martinez "to serve the anticipated needs of specific customers."

In Yellow Cab Company v. Cab Employers, supra n. 1, where, as in the pending case, the interstate commerce issue depended upon the "in flow" theory, the Court said: "Given the miniscule amount of business generated by Yellow Cab's interstate activity, it is readily apparent that intrastate business was the subject of the conspiracy." The Court also said: "Although it is true that the courts have held that a small amount of interstate commerce is sufficient to obtain federal jurisdiction, they have done so when the nature of the conspiracy has been directed against interstate commerce," distinguishing in this respect such cases as United States v. Bensinger Co., supra n. 1; United States v. Yellow Cab Co., 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947), and Las Vegas Merchant Plumbers Assn. v. United States, supra, and noting that in the case before it the alleged conspiracy "was not directly aimed at the portion of plaintiff's business which involved interstate commerce" but at its "intrastate" activity and also adding the classic test of Page v. Work, 290 F.2d 323, 330 (9th Cir. 1961) that "the test of jurisdiction is not that acts complained of affect a business in interstate commerce but that the conduct complained of affects the interstate commerce of such business." The Court concluded that there was "no merit in the 'in commerce' theory propounded by Yellow Cab."

All that really appears in this case is plaintiff's claim that it has been somehow precluded from purchasing some items of unspecified nature and unspecified amount (and, therefore, presumably a minimal amount) occasionally brought from Portland to Martinez but—so far as the evidence shows—never even purchased by Ford.

It would be straining, indeed, to hold that a bare possibility that Ford might at some time acquire one or more of such items would transform an otherwise purely *intra*-state relationship into an interrupted "flow" of interstate commerce.

There is no violation of the antitrust statute where the restraint on interstate commerce is non-existent or so insignificant as to call for application of the de minimis rule. 58 C.J.S. Monopolies § 22 n. 31, citing San Francisco Industrial Assn. v. United States, 268 U.S. 64, 83, 45 S.Ct. 403, 69 L.Ed. 849 (1925), where the Supreme Court considered a situation "so insignificant as to call for application of the maxim de minimis non curat lex," adding, "To extend a statute intended to reach and suppress real interference with the free flow of commerce among the several states to a situation so equivocal and lacking in substance would be to cast doubt upon the serious purpose with which it was framed."

This has been recognized by our Ninth Circuit in Yellow Cab Company v. Cab Employers, supra n. 1, where the court accepted appellee's contention that "the district court did not err when it deemed Yellow Cab's interstate business to be de minimis to its intrastate activity."

For the foregoing reasons the court has reached the conclusion that the evidence on the interstate issue is wholly insufficient, or at least so insubstantial and lacking in probative value, that there is no evidence whatsoever from which the jury might rationally have concluded that defendants restrained interstate commerce; that defendants' motion for judgment in defendants' favor notwithstanding the verdict, should for that reason be, and is,

hereby granted with the alternative provision that, in the event such order should for any reason be set aside or reversed on appeal, the order (hereby made) for a new trial on the interstate commerce issue, unless also set aside or reversed on appeal, shall remain in effect. (See Rule 50(c), F.R.Civ.P., and Moist Cold Refrigerator Co. v. Lou Johnson Co., 249 F.2d 246 (9th Cir. 1957).

Otherwise defendants' motions for judgment notwithstanding the verdict and/or for new trial are denied.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 72-2570

Ford Wholesale Company, Inc. of San Jose, a corporation,
Appellant,
vs.
Fibreboard Paper Products Corporation; State Shingle Co., Inc.; Wholesale Building Supply, Inc ; and Lone Star Cement Company,
Appellees.

[February 20, 1974]

OPINION

Appeal from the United States District Court
for the Northern District of California

Before: CHAMBERS and KOELSCH, Circuit Judges, and EAST,* District Judge

EAST, Senior District Judge:

The plaintiff-appellant (Ford) instituted this private antitrust action for damages under Section 4 of the Clay-

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

ton Act [15 U.S.C. §15] against the defendant-appellee Fibreboard Paper Products Corporation (Fibreboard) and the remaining above-named defendants alleging that Fibreboard and the other defendants "combined and conspired to monopolize, attempted to monopolize and did monopolize trade and commerce in the relevant market in violation of Sections 1 and 2 of the Sherman Act [15 U.S.C. §§1, 2]."

The proceedings in the District Court progressed through a jury verdict in favor of Ford for a substantial amount.

Thereafter, the District Court upon various motions of Fibreboard concluded "that the evidence on the interstate issue [was] wholly insufficient, or at least so insubstantial and lacking in probative value, that there is no evidence whatsoever from which the jury might rationally have concluded that defendants restrained interstate commerce;", set aside the jury verdict and judgment thereon in favor of Ford and on May 30, 1972, entered judgment for Fibreboard that the action be dismissed with costs to neither party.

Ford appeals and Fibreboard makes no cross-appeal from various adverse orders.

Ford asserts and we agree that "[t]he sole question before this court [on appeal] is whether the District Court was erroneous in ruling that interstate commerce was not involved in the defendants' anticompetitive conduct which otherwise constituted a violation of Section 1 of the Sherman Act. [15 U.S.C. §1.]"

Assuming arguendo then that there was sufficient material evidence in the record to support the jury's finding

on the *substantive issue* of Fibreboard's anticompetitive conduct, we turn to the *jurisdictional issue* of interstate commerce involvement of Fibreboard's anticompetitive conduct.

The record evidence on that issue is ably marshaled, surveyed and analyzed in the Memorandum of Decision of the District Court reported in *Ford Wholesale Company, Inc. of San Jose v. Fibreboard Paper Products Corporation, et al.*, 344 F.Supp. 1323 (1972); and from our review of the record we are satisfied to refer to and rely upon that marshaling as a statement of facts herein.

We conclude for the same reasons and upon the same legal grounds set forth in the District Court's Memorandum of Decision that the judgment entered thereon is correct in fact and at law.

Also, we are satisfied that the rationale utilized by the District Court for its judgment is wholly compatible with and justified under the test of the independent jurisdictional interstate commerce issue under the Sherman Act as correlated from prior authority and delineated in *Rosen v. Rossmoor Corporation, Golden Rain Foundation, Leisure World Foundation,* and *Crestmark Carpet and Drapery Company,* 9th Circuit, number 26,475, October 17, 1973.

> "The jurisdictional issue under the Sherman Act is distinct from the substantive issue of whether a given defendant's conduct was of the kind prohibited by the Act. *Rasmussen v. American Dairy Ass'n,* 472 F.2d 517, 521-24 (9th Cir. 1973). The jurisdictional issue is one of constitutional power. Congress intended to extend the substantive prohibitions of the Sherman

Act to the farthest reaches of its power under the Commerce Clause, thereby mandating for this nation a competitive business economy to the full extent that Congress could do so under its constitutional power to regulate interstate and foreign commerce. *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 558-59 (1944). The jurisdictional question, therefore, is whether defendants' conduct had a sufficient relationship to interstate commerce to be subject to regulation by Congress. *Rasmussen v. American Dairy Ass'n, supra,* 472 F.2d at 521. This, in turn, depends upon whether defendants' conduct had a 'substantial economic effect' upon interstate commerce, or, ' "concerns more States than one" and has a real and substantial relation to the national interest' in a competitive economy." Citing authorities, at pages 3 and 4, slip opinion;

'Thus, although the substantive and jurisdictional issues are often confusingly described in terms of the 'effect' of particular conduct upon commerce, as if a common question were presented, *see, e.g., Las Vegas Merchant Plumbers Ass'n v. United States,* 210 F.2d 732, 739-40, n.3 (9th Cir. 1954), the substance of the two inquiries is quite different. An unreasonable restraint on competition may have no impact upon interstate commerce, or an impact so insignificant that regulation under the Commerce Clause is not justified as a means of protecting interstate commerce. *Page v. Work,* 290 F.2d 323, 331-32 (9th Cir. 1961)." and

"When the issue is whether jurisdiction exists, the focus is upon interstate commerce: whether the defendant's conduct—unreasonably restrictive of competition or not—has a sufficient impact on interstate commerce to justify regulation under the Commerce Clause."

It is manifest from the record that Fibreboard's anti-competitive conduct had no significant impact on interstate commerce to justify regulation under the Commerce Clause.

When the test of *Rosen* was applied to the facts in that case, it was apparent that the defendants' anticompetitive conduct directly and substantially interfered with distribution of goods "in the flow" of interstate commerce in that carpeting coming into California from other states could not meet their destined use but remained in the warehouse of *Rosen.*

Likewise, the undisputed facts in *Copp Paving Co., Inc. v. Gulf Oil Co., et al.,* 9th Circuit, number 72-2152, October 3, 1973, also relied upon by Ford, presented an anticompetitive conduct plagued interstate enterprise so patently diverse from Ford's enterprise and its non-involvement in interstate commerce that further comment is not warranted except to say *Copp* was engaged in producing "instrumentalities of interstate commerce."

AFFIRMED.

Appendix C

United States Court of Appeals
for the Ninth Circuit

No. 72-2570
DC 45977 WTS

Ford Wholesale Company, Inc. of San Jose, a corporation,
Appellant,
vs.
Fibreboard Paper Products Corporation; State Shingle Co., Inc.; Wholesale Building Supply, Inc.; and Lone Star Cement Company,
Appellees.

[Filed Apr. 5, 1974]

ORDER DENYING PETITION FOR REHEARING

Before: CHAMBERS and KOELSCH, Circuit Judges, and EAST, District Judge

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

All active judges of the court have been notified of the suggestion for a rehearing en banc and none has voted for a rehearing en banc.